

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matters of	
Public Notice. Regarding AMTRAK Request for Waiver of Certain Part 80 AMTS Rules “To Implement PTC”	DA 11-322 WT Docket No. 11-27

To the Chief, Wireless Telecommunications Bureau

Petition for Reconsideration  
And  
Motion to Dismiss

“Petitioners,” the undersigned entities, request reconsideration and termination of the captioned Public Notice (the PN) regarding the above-noted “waiver” request of AMTRAK. For the same reasons, Petitioners request dismissal of the subject AMTRAK waiver request.

There are issues the FCC should deal with regarding railroad and broader Intelligent Transportation Systems, but any narrow issue as AMTRK presents is at best misleading in that it cannot be understood properly outside an broader strategic national ITS framework. In addition, the AMTRAK request is not what it appears, based on written documentation the undersigned has with AMTRAK and third parties. However, this pleading focuses on procedural and equitable defects.

Regarding the status of PTC, see: <http://strategicrailroading.com/2011/02/ptc-caveat-emptor/> . It is not what AMTRAK suggests.

Also, since Petitioners assert that the communications between AMTRAK and FCC staff, noted below, involve violation of ex parte rules, Petitioners are copying the FCC General Counsel.

### This PN Can Be Petitioned for Reconsideration

A party can petition for reconsideration FCC action under a Public Notice under 47 USC §405 and 47 CFR §1.106. See, for example: *In the Matter of Paging Systems, Inc. Petition for Reconsideration of Public Notice Announcing Procedures for Auction of Automated Maritime Telecommunications System Licenses* (Auction 61), DA 10-1242, *Order on Reconsideration*, 25 FCC Rcd 8476; 2010 FCC LEXIS 4027; 50 Comm. Reg. (P & F) 1197, July 1, 2010 Released, and *In the Matter of MetroPCS Communications, Inc., Petition for Reconsideration of Public Notice Announcing Procedures for Auction of AWS-1 and Broadband PCS Licenses* (Auction 78), AU Docket No. 08-46 , DA 10-376, *Order on Reconsideration*, 25 FCC Rcd 2209; 2010 FCC LEXIS 1440; 49 Comm. Reg. (P & F) 851, March 4, 2010 Released.

Petitioners have standing to file this petition since they hold AMTS spectrum nationwide and any substantive action on the subject AMTRAK “waiver” request could affect their rights as co-channel and adjacent-channel spectrum holders, as discussed in Petitioners’ presentations in the MCLM assignment of AMTS spectrum to SCRAA, including in the proceeding on that in WT Docket No. 10-83.

In addition, Petitioners have standing since AMTRAK is (only)<sup>1</sup> interested in AMTS spectrum of licensees other than Petitioners (held by Maritime Communications Land Mobile LLC [“MCLM”] and/ or Paging Systems, Inc. [“PSI”]) based on direct information AMTRAK provided to Petitioners in writing (that Petitioners did not agree to keep confidential), all of which Petitioners are challenging before the FCC.

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<sup>1</sup> AMTRAK required that, to consider any proposal from Petitioners (even ones made that afforded AMTS spectrum, some at no cost or on nonprofit basis) that they give up claims they had pending before the FCC as to facts and law concerning violations by MCLM of the Communications Act and FCC rules. Petitioners rejected that as an unacceptable, overreaching business practice, as potentially a violation of applicable acquisition regulations, and as contrary to the public interest as construed under the Communications Act. This is part of the misleading nature of the AMTRAK “waiver” request.

### AMTRAK Lacks Standing

AMTRAK lacks standing to seek, or have granted, any rule waiver under 47 CFR §1.925 or other basis (or declaratory ruling under 47 CFR §1.2 or other basis, if the subject waiver requires are morphed into this category) regarding licenses it does not hold and for which is has no pending application to obtain. In *City of Olmstead v. FAA*, 292 F.3d 261, the DC Circuit court cited an earlier, FCC case applicable here (underlining added):

Second, in *Suncom Mobile & Data, Inc. v. FCC*, 318 U.S. App. D.C. 377, 87 F.3d 1386 (D.C. Cir. 1996), Petitioners held that a prospective applicant for a 220 MHz transmission network license lacked Article III standing to challenge the FCC's (1) denial of its request for a declaration that its envisioned network qualified for a regulatory exemption from the FCC rule proscribing ownership of multiple 220 MHz licenses for service in a single 40-mile area and (2) denial of its request for a waiver of the customary eight-month construction deadline:

SunCom alleged no actual, existing interest in the licenses for which it made the two requests nor even a contract to acquire such but only an intent to purchase unidentified licenses sometime in the future, after FCC approval and station construction. Based on the allegations before the Commission, Petitioners see no likelihood that SunCom stood to suffer the kind of concrete, probable harm from the Commission's denials that Article III requires.

As with the case with SunCom, AMTRAK lacks standing in this case, both if this matter Petitionersre to go to court, under Article III standing, and under agency standing criteria which is on the same basis (by case precedent and since final agency actions are appealable to court under 47 USC 402).<sup>2</sup>

### The Bureau Lacks Authority

The Bureau lacks authority to take action in this matter, including the subject Public Notice and docket establishment. FCC rule § 0.131(a) does not vest authority in the Bureau to act upon so-called rule waivers for a party that is not subject to the rules. This section authorizes

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<sup>2</sup> See also: *Public Citizen v. Lockheed Aircraft Corp.*, 565 F.2d 708, 717-19 (D.C.Cir.1977): economic injury claimed was "too speculative" where association claimed only that its members Petitionersre interested in purchasing some of the property.

action on rule waivers but only under the purpose stated: "acts ... under delegated authority, in all matters pertaining to the licensing and regulation of wireless telecommunications.... acting on rule waivers...." AMTRAK is not subject to any licensing or regulation regarding any AMTS spectrum, and thus the Bureau has no delegated authority to act on its "waiver" requests. This is not a notice on inquiry on a broad topic such as what is appropriate spectrum and wireless tech and systems for railroads (that would be a good public debate and proceeding), but a licensing waiver action, and there is no authority for it, since there is no licenses involved.

If a person not known to the FCC (of with little "clout") told the FCC it wants waivers to use Verizon's CMRS licenses that it may buy out in the future, the FCC obviously would and should summarily reject it and not waste resources. The Bureau cannot entertain this AMTRAK request, even though AMTRAK is well known, first since it lacks delegated authority to do so, but also since if it does, it opens the door to many other speculative requests of this sort, which would waste the public resource of FCC staff time and procedural resources, and potential court challenges, etc.

#### Ex Parte Rule Violations

The Communications between FCC staff and AMTRAK leading to the subject waiver requests, PN and docket are impermissible ex parte communications.

Those communications, if written, had to be but were not served upon Petitioners. To the extent they were oral, the required process of notification and opportunity to participate was not followed. Petitioners involved are those which hold AMTS spectrum that could be subject to what the PN indicates is the ultimate *direct* purpose of the subject waiver request: Skybridge Spectrum Foundation, Environmental LLC, and Intelligent Transportation & Monitoring Wireless LLC, and the obvious indirect Trojan-Horse purpose of getting FCC approval to change AMTS for railroad PTC even when the subject spectrum is under serious FCC investigations for

disqualifying action by the licensees: a way to get FCC signals that it will launder the defects for US railroads if they assert enough pressure.<sup>3</sup> The other Petitioners are also involved for reasons made clear in all of the Petitioners pending challenges to the MCLM and PSI AMTS licenses that are the subject of the subject waiver requests.

Contrary to the PN indications, this is not a simple request by AMTRAK to grant it waivers it may or may not ever use. As noted above, AMTRAK specifically decided, in communications with Petitioners, to limit their acquisition actions for AMTS to non-Petitioners spectrum. Petitioners also obtained in the public domain a copy of the MCLM proposal to AMTRAK to sell AMTS geographic and site-based AMTS to AMTRK that had false representations, that violated Petitioners rights under FCC rules including §§ 80.385(b) and (c) (among other rules), and that is based upon many violations of FCC and other law which Petitioners outlined to AMTRAK and that is clear in pleadings filed upon said MCLM AMTS spectrum licenses on ULS. See also Petitioners' Section 1.65 Report filed under those licenses earlier this week, regarding litigation in US District Court. AMTRAK and its counsel were provided copies.

The subject waiver request and PN were necessarily based upon communications between AMTRAK and FCC staff in which AMTRAK was taking the position, directly or indirectly, that said other-party AMTS site-based and geographic spectrum (of MCLM and perhaps PSI also) is valid and is what AMTRAK may buy and seek FCC assignment approval, if the waivers are granted. That involves impermissible "presentations" to the FCC since as noted above Petitioners have pending restricted proceedings that issue of validity and assignability.

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<sup>3</sup> This is the latest in a series of such attempts by MCLM and its prospective AMTS spectrum assignees. All such attempts are described in oppositions and other pleadings filed by Petitioners copies of which are under the subject MCLM AMTS licenses.

### Equitable and Other Matters

In relation to but also apart from the ex parte rule violation issues, these communications with AMTRAK and FCC staff, the PN and the Docket are unfair and unequal and discriminatory application of Bureau resources. For example (several out of dozens of like examples clear in FCC records): Petitioners are stating below facts as to FCC lack of actions, not making any argument or request for action or information in the below matters:<sup>4</sup>

- AMTRAK alleges to need AMTS for Positive Train Control, which is considered an "Intelligent Transportation Systems" application, and seeks waivers when it has not standing to do that, and the Bureau has no authority to act upon that. Yet that was put on PN quickly, based upon my direct knowledge of AMTRAK involvement in AMTS spectrum that Petitioners can testify to as needed in relevant FCC and court proceedings.

- That will require time of Petitioners to respond, for like reasons Petitioners responded to the Mobility Division's placing on public notice the SCRAA-MCLM assignment and waiver matters, including since Petitioners have claims to and/or against all of the AMTS spectrum to which the AMTRAK waiver requests applies. Petitioners have claims to all of the MCLM geographic spectrum since Petitioners the lawful high bidders for it in Auction 61, and in the AMTS North Atlantic license area, Petitioners hold (depending on the sub-areas) either both the A and B block, or the B block, and Petitioners hold the B block in the AMTS Mid Atlantic license area from Auction 57, and these geographic licensees have claims to all of the site-based licenses spectrum based on automatic termination for various reasons, including lack of required construction, coverage and permanent operation, as provided in 47 CFR §80.385(c).

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<sup>4</sup> In any case, regarding ex parte issues, Petitioners copy MCLM and PSI which whose licenses are involved in the matter noted below regarding AMTS since in this filing Petitioners comment adversely upon their AMTS licenses. The matter noted regarding M-LMS is noted on a FCC delay basis only.

- It is clear from statements Petitioners have from various companies involved in railroads, which the FCC is familiar with (since these or some of these are in public proceedings), and from information Petitioners have from and in relation to direct dealings with AMTRAK, that MCLM, its spectrum-sale agents, and railroads (and Petitioners believe PSI also, on evidence and belief), seek to have the FCC provide extraordinary and unlawful relief for the railroads to "occupy" (as some railroads have put it) the AMTS band for asserted PTC public safety reasons and short-circuit applicable law in properly deciding up the claims of my companies to the MCLM and PSI AMTS spectrum, and also short-circuit the FCC's investigations of MCLM indicated herein. This AMTRAK waiver request that has no procedural justification is one more attempt by in this regard, and it is wasteful of FCC resources (if used lawfully in the public interest) and unlawfully damaging to my companies to have to defend, once more, Petitioners' well-founded claims.

In contrast to the above-noted FCC prompt service to AMTRAK, where AMTRAK has no spectrum at all for obtaining that service, and which will take up resources of my companies, and re-hash essentially the same matter as in the proceeding on MCLM-SCRAA (including the waivers involved)--

- Petitioners have had pending, since year 2003, a matter dealing with the entire M-LMS Intelligent Transportation Systems ("ITS") Radio Service nationwide. See RM-10403 which led to NPRM 06-49. Petitioners have presented scores of in-person and written presentations, including support from ITS trade organizations, two major ITS research institutes under State of California agency, and various PhD experts, defending the Commission rules for M-LMS (which includes accommodation of Part 15 use). Our companies Telesaurus Holdings GB LLC and Skybridge Spectrum Foundation hold most all of the M-LMS A block (5.75 MHz total) in the nation.

- Regarding AMTS, where the requesting party does have standing: (a) The FCC Wireless and Enforcement Bureaus investigation of MCLM is based upon (cited facts directly from, and raised questions based on those) my companies pending petitions under 47 USC §405 but those petitions Petitioners not granted. Our petitions have been pending since 2005. Our companies also presented the following, with regard primarily to AMTS spectrum, also with no resolution by the FCC (in this case, no action at all) October 14, 2009.

- The PN cites public law, but there is nothing is said law directing or suggesting that AMTRAK obtain AMTS spectrum. There is no reason based on current radio and computer technology that AMTRAK has to have spectrum adjacent to what the freight railroads decided to buy, 220 MHz, even apart from "PTC" uses.

- Also, Skybridge, one of the Petitioners, has pending before AMTRAK a FOIA request which AMTRAK to date denied in full. See attachment hereto. In addition, one or several Petitioners will be submitting an FOIA request to the FCC for documents relevant to the matters of this email. Petitioners have a pending case in US District Court against the FCC for unlawful FOIA denials- withholdings related to AMTS spectrum subject to the matters of this email. With regard to the Federal Railroad Authority, it also unlawfully acted in response to Skybridge's request for records dealing with AMTRAK PTC and FCC-spectrum matters including AMTS. Thus, the three most relevant Federal agencies (Petitioners include AMTRAK in this regard, as some courts have for FOIA and other purposes) each have delayed in and violated basic FOIA disclosure requirements, and this shows prejudice and intent to act for private party benefits. They all act as if Congress other authority has provided definitions or preferences regarding PTC with regard to radio spectrum involved and associated radio equipment and systems components, but that is false. For example, see Petitioners filings in the above-noted SCRAA docket and the following: <http://strategicrailroading.com/2011/02/ptc-caveat-emptor/>



As noted above, we attach here to an exchange regarding AMTRAK failure to produce documents required under FOIA. We also attach hereto an email from Petitioners to counsel to AMTRA in this proceeding. AMTRAK did not respond to Petitioners suggestion to discuss issues. Prior to that, AMTRAK staff also refused to discuss issues indicated above. (Neither did SCRAA counsel or its staff, when Petitioners likewise sought discussion on like issues.) Petitioners approach is constructive but not superficial. It is indicated here:

<http://www.scribd.com/doc/47831900/Skybridge-217-222-MHz-Plus-for-Government-PTC-Smart-Infrastructure> <sup>5</sup>

As stated at the start of this pleading, there IS a need for a FCC docket on the broad issues of railroad and other ITS, but narrow proceedings with hidden agendas and misleading filings is contrary to the public interest of US ITS and the Communications Act.

### Conclusion

For reasons given above, the above-captioned docket should be terminated and the subject AMTRAK waiver request should be dismissed.

[Execution on next page.]

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<sup>5</sup> Petitioners wireless spectrum and business is described in papers here:  
[www.scribd.com/warren\\_havens/shelf](http://www.scribd.com/warren_havens/shelf)

Respectfully submitted,



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Warren C. Havens

President of each Petitioner listed below

*Skybridge Spectrum Foundation*

ATLIS Wireless LLC

V2G LLC

Environmentel LLC

Verde Systems LLC

Telesaurus Holdings GB LLC

Intelligent Transportation & Monitoring Wireless LLC

Berkeley California

[www.scribd.com/warren\\_havens/shelf](http://www.scribd.com/warren_havens/shelf)

510 841 2220 x 30

510 740 3412 - fax

**From:** Warren Havens (warren.havens@sbcglobal.net)  
**To:** HawkinS@amtrak.com; mgriffith@telesaurus.com;  
**Date:** Fri, February 25, 2011 1:39:08 PM  
**Cc:** jstobaugh@telesaurus.com;  
**Subject:** Re: AMTRAK FOIA 11-FOI-00035

Mr. Hawkings,

We were not given any indication of a substantive response or a date.

Thus, we discussed with legal counsel today as to preparation of a case in court, including to obtain legal fees award.

We are also filing today a certain pleading with the FCC that notes this AMTRAK FOIA matter, in a docket involving AMTRAK.

The FOIA statute allow expedition, but that means before the statutory deadline, not after.

Sincerely,  
Warren Havens

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**From:** "Hawkins, Sharron" <HawkinS@amtrak.com>  
**To:** Mark Griffith <mgriffith@telesaurus.com>  
**Cc:** Warren Havens <warren.havens@sbcglobal.net>; Jimmy Stobaugh <jstobaugh@telesaurus.com>  
**Sent:** Fri, February 25, 2011 1:28:14 PM  
**Subject:** RE: AMTRAK FOIA 11-FOI-00035

Mr. Griffith, per our February 24, 2011 telephone conversation, you were informed that we are working on your FOIA request. In order to expedite the process, we will respond to your request on an interim basis.

Please let me know if you have any questions.

Sharron Hawkins  
FOIA Officer  
Amtrak – Law Dept  
60 Massachusetts Avenue, NE  
Washington, DC 20002  
(202) 906-3741 (office)  
(202) 906-3285 (fax)

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**From:** Mark Griffith [mailto:mgriffith@telesaurus.com]  
**Sent:** Thursday, February 24, 2011 1:45 PM  
**To:** Hawkins, Sharron  
**Cc:** Warren Havens; Jimmy Stobaugh

**Subject:** AMTRAK FOIA 11-FOI-00035

Amtrak  
c/o Sharron Hawkins, FOIA Officer  
60 Massachusetts Avenue, NE  
Washington, DC 20002  
1-202-906-3741  
[Hawkins@amtrak.com](mailto:Hawkins@amtrak.com)

February 24, 2011

Re: FOIA # 11-FOI-00035

Ms. Hawkins,

On December 17, 2010, Skybridge Spectrum Foundation (Skybridge) submitted FOIArequest # 11-FOI-00035.

On December 21, 2010, we received a letter from you stating, "You may anticipate a response on or by January 4, 2011."

As of today, February 24, 2011, we still have not received any responsive documents.

As you know, we spoke to you on the phone on Tuesday, February 22, 2011, regarding these matters. At that time, you stated you had our file but had no information as to when AMTRAK would give a response or what the response may be. Also, on that call, we informed you that we need the documents at this time due to a certain proceeding involving AMTRAK at the Federal Communication Commission.

According to the Freedom of Information Act, 5 USC § 552 (a) (6) (A) "Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall (i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefore, and of the right of such person to appeal to the head of the agency any adversedetermination ..."

Since the FOIA Law provision of 20 days to respond has passed, please immediately provide us with all the responsive documents we requested.

If we do not receive all the responsive documents by the end of next week, we will instruct our legal counsel to take appropriate action.

Mark Griffith , for

Warren Havens  
Skybridge Spectrum Foundation  
2509 Stuart Street  
Berkeley, CA 94705  
1-510-841-2220

**From:** Warren Havens (warren.havens@sbcglobal.net)  
**To:** bhiggins@wbklaw.com;  
**Date:** Thu, February 24, 2011 2:44:50 PM  
**Cc:** HillS@amtrak.com; McCartT@amtrak.com; jstobaugh@telesaurus.com;  
**Subject:** AMTRAK - FCC PN DA 11-322

Lawrence J. Movshin  
Brian W. Higgins  
Legal counsel for AMTRAK  
Wilkinson Barker  
2300 N. Street NW, Suite 20037  
Washington DC 20037

Mr. Higgins,

I called and left a voice mail for you today. If you would like to discuss those matters, please give me a call.

As I said in the voice mail, I try to clarify and reduce issues before the FCC in matters my companies have an interest.

As I noted in my voice mail, from information I have, the AMTRAK waiver request subject of the FCC PN referenced above is not what it appears.

Based on my reading of the facts and law, I also believe it is procedurally defective.

I also believe AMTRAK is off track in its approach to PTC, obtaining spectrum, using what it has, conducting solicitation that will involve public money, and other matters. There are legitimate public issues that should be debated and not railroaded, as is the mode being employed regarding PTC and especially 220 MHz- range PTC. What the private freight operators do is one thing, but what public-agency or publicly-owned and -subsidized rail does is another and should not employ jargon or simplistic approaches, dodge real issues, or be an extension of the private freight interests and program.

I would be happy to hear a different view on each of those and other related items if you want to discuss.

I am copying Mr. Hill and Ms. McCartney of AMTRAK who I mentioned in my voice mail. I assume you are familiar with the communications exchanges between us. I also noted in my voice mail that I have a copy of the Mobex response to the AMTRAK RFQ they handled, and other documents.

In addition, AMTRAK has violated FOIA law by not responding to my Foundations FOIA request. It is far past the statutory deadline. We intend to file a suit in US District Court regarding the violation and seek attorney fees in the near future. I note that here in case you want to advise AMTRAK in this matter. Our Foundation sought certain record in part since we expected FCC action along the lines of the subject PN and want to review and draw from requested documents in the public FCC proceeding. I intend to note in the FCC proceeding this FOIA situation.

In addition, my companies have litigation against the other AMTS spectrum holders. Attached is a recent FCC Section 1.65 report on that matter. I explained that case to AMTRAK previously, and it is also noted in FCC ULS records of these other AMTS spectrum holders.

My voice mail, this email, and any discussion we have on the phone are not confidential.

Sincerely,

President  
*Skybridge Spectrum Foundation*  
ATLIS Wireless LLC  
V2G LLC  
Environmental LLC

Verde Systems LLC  
Telesaurus Holdings GB LLC  
Intelligent Transportation & Monitoring Wireless LLC  
Berkeley California  
[www.scribd.com/warren\\_havens/shelf](http://www.scribd.com/warren_havens/shelf)  
[www.docstoc.com/profile/warrenhavens01](http://www.docstoc.com/profile/warrenhavens01)  
510 841 2220 x 30  
510 848 7797 -direct

Certificate of Service

I, Warren C. Havens, certify that I have, on this 25<sup>th</sup> day of February 2011, caused to be served by placing into the USPS mail system with first-class postage affixed a true copy of the foregoing “*Petition for Reconsideration and Motion to Dismiss*,” to the below-listed parties<sup>6</sup>

Copies served by email, indicated below, are for convenience. (Petitioners attempt, on their side, to expedite FCC proceedings they are involved with by said complimentary email service.)

Lawrence J. Movshin  
Brian W. Higgins  
Legal counsel for AMTRAK  
Wilkinson Barker  
2300 N. Street NW, Suite 20037  
Washington DC 20037  
( Courtesy copy via email to: bhiggins@wbklaw.com)

Dennis Brown  
Legal counsel for MCLM and Mobex  
8124 Cooke Court, Suite 201  
Manassas, VA 20109-7406  
(Courtesy copy via email to d.c.brown@att.net )

Sandra DePriest, Donald DePriest, and John Reardon  
Maritime Communications/ Land Mobile LLC  
206 North 8th Street  
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Audrey P. Rasmussen  
Legal counsel to Paging Systems Ince  
Hall, Estill, Hardwick, Gable,  
Golden & Nelson, P.C  
1120 20th Street, N.W.  
Suite 700, North Building  
Washington, DC 20036-3406  
(Courtesy copy via email to: arasmussen@hallestill.com )

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<sup>6</sup> Said delivery to the US Postal Service may be after business hours, and if so, the postmark will be the following business day.



Paging Systems, Inc.  
S. Cooper , R. Cooper  
PO Box 4249  
Burlingame, CA 94011-4249

Fletcher Heald & Hildreth  
Legal counsel to Southern California Regional Rail Authority  
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(Courtesy copy via email to: [feldman@fhhlaw.com](mailto:feldman@fhhlaw.com) )

Southern California Regional Rail Authority  
ATTN Darrell Maxey  
700 S. FloPetitionersr St. Suite 2600  
Los Angeles, CA 90017  
(Courtesy copy via email to [maxeyd@scrra.net](mailto:maxeyd@scrra.net) )

FCC Office of General Counsel  
Attention: Ex parte complaints  
445 12th Street, S.W., Washington, D.C. 20554  
Federal Communications Commission,  
(Copy to: [David.Senzel@fcc.gov](mailto:David.Senzel@fcc.gov))



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Warren Havens